RQ-908



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OFFICE OF THE

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August 2, 1996

JUSTICE CENTER 401 W. BELKNAP STREET FORT WORTH, TX 76196-0201

Hon. Dan Morales Attorney General State of Texas P.O. Box 12548 Austin, TX 78711-2548

CMRRR NO. <u>P 283 415 286</u>

RE:

Whether a State District Judge may order, as a condition of probation, that a sex offender post a sign warning the community, and whether specific proposed language is proper.

Dear General Morales:

The Judge of Tarrant County Criminal District Court Number One, a statutory district court with original jurisdiction over criminal cases, Texas Government Code § 24.910, has requested an opinion regarding her judicial authority to require that, as a condition of community supervision, formerly called probation, certain signage be posted by sex offenders. Due to the importance of the question, we respectfully request your opinion and we submit this letter-brief in support of our request.

The Judge states as follows:

"The proposed sign is 12 inches x 24 inches and bears 3 inch black letters on a white background that says "A PERSON ON PROBATION FOR A CHILD SEX OFFENSE LIVES HERE." Please note that standard street signs contain 4 inch letters. Attached to this letter is the proposed form for the condition of probation relating to the signage.

This letter is my formal request for your legal opinion to the following two inquiries:

- 1) Whether the present state of the law allows a Judge to set a term of supervision requiring such signage for child sex offenders; and
- 2) Whether the proposed sign and proposed condition of probation are legally sufficient and proper."

Attached to this letter for your information is a copy of the Judge's letter and her proposed language.

Conditions of Probation.

When considering a condition of probation [now called "community supervision," Texas Code of Criminal Procedure art. 42.12 § 2(2)] imposed on a defendant by a trial judge, the standard of review is whether the Court abused its discretion. See e.g., Tamez v. State, 534 S.W.2d 686, 690-93 (Tex. Crim. App. 1976); Gibbons v. State, 775 S.W.2d 790, 794-95 (Tex. App.-Dallas, 1989, pet. ref'd). The Texas Code of Criminal Procedure governs court ordered probation. Specifically, Article 42.12, provides:

- Sec. 1. It is the purpose of this article to place wholly within the state courts the responsibility for determining when the imposition of sentence in certain cases shall be suspended, the conditions of community supervision, and the supervision of defendants placed on community supervision, in consonance with the powers assigned to the judicial branch of this government by the Constitution of Texas. It is the purpose of this article to remove from existing statutes the limitations, other than questions of constitutionality, that have acted as barriers to effective systems of community supervision in the public interest. (Emphasis added.)
- Sec. 2. "Community supervision" means the placement of a defendant by a court under a continuum of programs and sanctions, with conditions imposed by the court (Emphasis added).
- Sec. 3. (a) A judge, in the best interest of justice, the public, and the defendant, after conviction or a plea of guilty or nolo contendere, may suspend the imposition of the sentence and place the defendant on community supervision (Emphasis added).

- Sec.11. (a) The judge of the court having jurisdiction of the case shall determine the conditions of community supervision and may, at any time, during the period of community supervision alter or modify the conditions. The judge may impose any reasonable condition that is designed to protect or restore the community, protect or restore the victim, or punish, rehabilitate, or reform the defendant. Conditions of community supervision may include, but shall not be limited to, the conditions that the defendant shall: . . .
 - (16) Register under Article 6252-13c.1, Revised Statutes; ...

(Emphasis added.)

Texas Code of Criminal Procedure art. 42.12.

The Legislature has declared its intent to empower the courts to use the community supervision system creatively, toward the end of protecting the public and the victims and rehabilitating the defendant. The Court is limited only by constitutional considerations, but otherwise may impose any reasonable condition.

The Twelfth Court of Appeals, in considering when a condition of probation is invalid, held that a condition is only invalid if it possesses all three of the following characteristics:

- (1) it has no relationship to the crime;
- (2) it relates to conduct that is not in itself criminal; and
- it forbids or requires conduct that is not reasonably related to the future criminality of the defendant or does not serve the statutory ends of probation.

Lacy v. State, 875 S.W.2d 3 (Tex. App.--Tyler, 1994, pet. ref'd) (Held: valid to impose as condition of probation that probationer cease working at his place of employment -- a tavern; defendant, convicted of driving while intoxicated, was ordered as a condition of probation to 'stay out of all bars, taverns, lounges or similar places'.)

The reasonableness of the condition of probation is the crucial question. See Tamez v. State, supra; Gibbons v. State, supra; Crabb v. State, 754 S.W.2d 742, 745-46 (Tex. App.--Houston [1st Dist.] 1988, pet. refd), cert denied, 493 U.S. 815, 110 S.Ct. 65, 107 L.Ed.2d 32 (1989); Pequeno v. State, 710 S.W.2d 709, 710 (Tex. App.--Houston [1st Dist.] 1986, pet. refd).

"Reasonableness," we believe, is a broad category, indicating the confidence the Legislature has placed in the judges. We recognize that there are various factors a judge will need to consider on a case-by-case basis. A judge will want to consider whether the sign will tend to identify the victim, and will also want to consider who else lives at the residence, whether the same is owned by

the defendant or another, whether the sign is likely to jeopardize persons or property by acting as an invitation to violence against the defendant or others, rights of third parties affected by the sign, and such other arguments as the defendant may raise. However, the sign clearly is related to the crime and is designed to protect the public and the victim, and can assist the defendant's rehabilitation efforts by warning children away from the premises. Accordingly, the case-by-case determination of reasonableness of the condition is within the trial judge's discretion. A judge would be well-served to make specific findings on the record as to how, in the specific case, the condition fulfills one or more of the purposes of Article 42.12, Sec. 11.1

As to the constitutionality of the proposed condition, we are unable to conclude that the condition would violate the Constitution of Texas or of the United States. The defendant has already been afforded due process before becoming subject to this or any other condition of community supervision.

We have reviewed the sex offender registration statute, Article 6252-13c.1, Tex. Rev. Civ. Stat., and your opinion ORD-645 (1996). We note that your opinion concludes that the sex offender's registered numeric street address is confidential in the hands of DPS and must be withheld by DPS. However, we do not believe this statute limits a judge in setting conditions of community supervision. Moreover, signage placed on the defendant's home will only come to the attention of persons in the actual, direct vicinity of the sex offender, which is directly related to protecting the public, whereas the DPS list of addresses could easily be widely disseminated among persons who never venture into the hazard of proximity to a specific offender's home.

Having reviewed the statutes, the cases, and the proposed language, we conclude that the proposed language would probably not be found unconstitutional by a court and that, when reasonable in a specific case, the proposed condition of probation would be permitted. The test of whether or not, in a given case, the requirement would be reasonable would depend on the facts of the case, and the Legislature clearly intended that the trial court be the authority to make this case-by-case determination, subject only to constitutional constraints. A factor which the trial court

¹As to the specific language of the proposed condition, the Court will want to take due care not to order the defendant to violate any valid city ordinance or other sign law or restriction; this would place the defendant in a position where compliance with one condition (post the sign) violates another condition (do not violate any laws). But see Lacy v. State, supra, wherein the court found that, under specific facts, it was reasonable to require the defendant as a condition of probation to cease working at his place of employment. For the same reason, the restrictions of pre-existing leases or other apartment, rental, condominium or other rules relating to signage would need to be considered. Moreover, attempted abrogation of the rights of third parties could subject the Court to ancillary litigation between the defendant and third parties. Accordingly, the proposed condition should be modified by prefacing it with:

[&]quot;If not prohibited by applicable city ordinances, subdivision regulations, pre-existing contractual or lease agreements, or other similar restrictions, the defendant shall affix or cause to be affixed"

would no doubt need to consider in making a case-specific determination of reasonableness include whether there are any unique consequences that might result from the requirement in a given case. (For example, if the sign or the affixing of the sign violates municipal sign ordinances or other law applicable to the location where a judge might otherwise order the sign posted, the condition could be unreasonable because it would require the defendant to violate the law. Likewise, the sign might be prohibited by a lease provision or a deed restriction prohibiting signs. While we believe that a court could, in a proper case, require the probationer to live elsewhere where the sign would be permitted, just as a court can require a probationer to work elsewhere, *Lacy v. State, supra*, this result should be taken into consideration by the court when considering the facts of the case to determine reasonableness).

For the reasons set out above, it is our opinion that a judge may, as a condition of community supervision, order a defendant to post signage on his/her residence declaring that a person on probation for a child sex offense lives there, provided that the condition is reasonable under the circumstances of the case, does not identify the victim, and would not violate the Constitution of Texas or of the United States.

Please advise us of your opinion. Let us know if you desire further information.

Respectfully submitted,

TIM CURRY

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AD/gbb

Enclosures: letter from Judge Sharen Wilson with attachment

cc: Honorable Sharen Wilson

Judge, Criminal District Court Number One